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In The

Supreme Court of the United States

October Term, 1997

PANDA-KATHLEEN, L.P.,

Petitioner,

vs.

FLORIDA POWER CORPORATION and FLORIDA PUBLIC SERVICE COMMISSION,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Florida

BRIEF IN OPPOSITION FOR RESPONDENT FLORIDA PUBLIC SERVICE COMMISSION

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QUESTION PRESENTED

Respondent, Florida Public Service Commission (FPSC or Commission) believes that the question presented by Panda's Petition is not presented by the cases cited therein and that Panda has not identified any actual conflict between those cases and the FPSC's order affirmed by the Florida Supreme Court. Instead, the question presented by Panda's petition is as follows:

> Whether Panda has identified an exemption whereby state regulatory authorities can be preempted from implementing the rules they adopted pursuant to the Public Utilities Regulatory Policies Act of 1978 [PURPA], as required by section 210(f) of that Act.

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STATEMENT OF THE CASE

A. The Florida Power Corporation/Panda Kathleen Contract.

Panda and Florida Power entered into, and the FPSC approved[1], a standard-offer contract which required compliance "with FPSC Rules 25-17.080 through 25-17.091 in effect as of the Execution Date". (Pet. App. at 24a). This case concerns Panda's attempts to evade two of those rules, which the FPSC adopted to implement PURPA. (Pet. App. at 7-8a). The first, Rule 25-17.0832(3)(a), limited the availability of these standard offer contracts, including Panda's, to "contracts for the purchase of firm capacity and energy from *small qualifying facilities less than 75 megawatts* . . .". [e.s.] (Pet. App. at 2a, 24a, 90a). The second, Rule 25-17.0832(3)(e)6, limited the duration of firm capacity and energy delivery from a qualifying facility, such as Panda, to a utility, such as FPC, to, "*[a]t a maximum* . . . the anticipated plant life of the avoided unit . . ." [e.s.] (Pet. App. at 2a, 25a, 91-92a). Schedule 2 to Appendix C of this contract identified the economic plant life of the avoided unit as equal to 20 years. (Pet. App. at 2a, 24-26a).

As authorized by Section 366.051, Florida Statutes, these two rules were adopted by FPSC pursuant to the requirement of § 210(f), 16 U.S.C. § 824a-3(f), that each state regulatory authority implement the Federal Energy Regulatory Commission's [FERC] PURPA [Public Utilities Regulatory Policies Act of 1978] rules concerning cogeneration. (Pet. App. at 7-8a, 80-81a). Such state "PURPA implementation" rules, including the two FPSC rules just discussed, are *not preempted*, and *PURPA forbids exemption* of qualifying cogeneration facilities from compliance with them. (Pet. App. at 5a, n.1.) To

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1. FPSC approved the contract October 22, 1992. (Pet. App. at 2a.)

summarize, this FPSC approved contract required, pursuant to the two PURPA implementation rules enacted by Florida discussed above, that the net generating capacity of Panda's plant not exceed 74.9 MW and that the duration of firm capacity and energy delivery from Panda to FPC not exceed 20 years. Federal law, in turn, required that Panda *not be exempted from these state rules*. 16 U.S.C. § 824a-3(e)(3)(A) (1994). Against this backdrop, the litigation took place which is described, although inaccurately, by Panda in its Petition.

B. The Florida Supreme Court's Decision.

As noted by the Florida Supreme Court, the litigation began when Florida Power petitioned the Commission in 1995 alleging that, despite these rules, Panda planned to build a 115 MW plant and claimed the right to deliver 30 years, rather than 20 years, of firm capacity and energy to Florida Power. (Pet. App. at 1-3a.)

Given the facial inconsistency between the parameters established by state rules Panda admits were incorporated in the contract, Petition, p. 2 n.1, and Panda's plan to build a larger plant than the rules permitted and deliver firm capacity and energy for 10 years longer than the rules permitted, it is not surprising that both the FPSC and the Florida Supreme Court rejected Panda's arguments. For its part, Panda apparently decided to make up for a case lacking on the merits with a proliferation of theories concerning preemption. The version this Court now has before it is only the latest of many attempts by Panda to fit preemption theories to facts and law which have nothing to do with those theories.[2]

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2. Pursuant to Federal Rule of Evidence 201(b), the Court may take judicial notice that Panda's latest version of its preemption theory, *i.e.*, that the FPSC *invalidated Panda's contract*, is at odds (Cont'd)

REASONS FOR DENYING THE WRIT

While FERC has promulgated rules exempting cogenerators from certain forms of state regulatory control, specifically, laws and regulations respecting the *rates*, or respecting the *financial or organizational* regulation of electric utilities, Panda has not identified any connection between these limited preempted areas and the dispute resolved by the Florida Supreme Court in the challenged decision. (Pet. App. at 1-12a.) Moreover, the FPSC was required to implement PURPA in Florida and, by operation of federal law, neither Panda nor any other cogenerator may be exempted from compliance with FPSC's PURPA implementation rules, including the two rules at issue in this case. (Pet. App. at 5a, n.1) (16 U.S.C. § 824a3(e)(3)(A) (1994)). Indeed, the authorities that address this issue, including those relied on by Panda, carefully differentiate conflicts involving the preempted areas of rates and financial or organizational regulation from those which concern state PURPA implementation rules.

(Cont'd)
with Panda's current representations to the FPSC. In Panda's *Motion For Extension Of Contract Performance Dates*, filed with FPSC January 6, 1998, and still pending, there is no hint that Panda believes the contract to have been invalidated. As stated therein by Panda,

> The bona fide dispute between the parties was not resolved until conclusion of the proceedings in the [Florida] Supreme Court.
>
> Panda is willing to abide by the final order and build the power plant in accordance with the Commission's ruling.

Motion, p. 1. Apparently, Panda's Petition amounts to nothing more substantial than a litigant hedging its bets.

Because Panda fails to differentiate the preemption category from the state PURPA implementation rules category, it is Panda's arguments which irreconcilably conflict with the decisional law announced by every federal and state court to have addressed these issues. There is, in fact, no disharmony whatever resulting from the decision of the Florida Supreme Court challenged here and, therefore, no threat to carrying out Congressional intent which could commend this matter to the Court's attention.[3]

I.

THIS CASE IMPLICATES THE IMPLEMENTATION ASPECT OF PURPA, NOT PREEMPTION.

As noted earlier, Panda's discussion of state preemption in the abstract comes up short for lack of any connection between the subject matter of this case and the two areas in which the states are preempted, namely rate regulation and financial or organizational regulation.

In this case, Panda's participation in the standard offer contract was subject to, *inter alia*, two conditions incorporated as contract terms by state rules implementing PURPA. First, the plant could not exceed 74.9 MW in net generating capacity. Second, Panda could not select a term of firm capacity and energy delivery exceeding 20 years. Neither of these conditions implicates the two exempt areas. Instead, only the rules adopted by the FPSC to implement PURPA are implicated.

As this Court noted in *FERC v. Mississippi*, 456 U.S. 742, 751 (1982),

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3. Panda also fails to provide any reasoning supporting its one-sentence allegation of jurisdiction pursuant to 28 U.S.C. § 1257(a). Petition, p. 1.

> FERC has adopted regulations relating to purchases and sales of electricity to and from cogeneration and small power facilities. These afford state regulatory authorities and nonregulated utilities latitude in determining the manner in which the regulations are to be implemented. Thus, a state commission may comply with the statutory requirements by *issuing regulations*, by *resolving disputes* on a case-by-case basis, or by *taking any other action reasonably designed* to give effect to FERC's rules [e.s]

Here, Florida exercised its latitude in determining the manner in which to implement FERC's regulations by *issuing a regulation* providing *small QFs less than 75 MW* with special encouragement through the availability of standard offer contracts. FPSC then *resolved a dispute* regarding its implementation of PURPA which arose when Panda claimed that a 115 MW plant it intended to build would be consistent with the "small QF less than 75 MW" standard in that regulation, or, alternatively, that the regulation was irrelevant. The Commission rejected Panda's assertions and the Florida Supreme Court affirmed. As noted by FPSC, a plant designed to produce 115 MW, such as Panda announced in 1995 that it planned to build, was ineligible for participation in the standard offer contract which FPSC had approved between Panda and Florida Power in 1992.

Similarly, Florida implemented FERC's regulations, 16 U.S.C. § 824a-3(b), constraining payments by utilities to cogenerators at "avoided cost" by, *inter alia*, *issuing a regulation* providing that, at a maximum, the duration of firm capacity and energy delivery from a cogenerator to a utility could not exceed the plant life of the avoided unit. The Commission then *resolved a dispute* regarding its implementation of PURPA which arose when Panda claimed that it was entitled to provide 30

years of firm capacity and energy rather than for the 20 year plant life of the avoided unit in the contract, or, alternatively, that the regulation was irrelevant. FPSC rejected Panda's assertions and the Florida Supreme Court affirmed. As noted by FPSC, the Commission only had authority under PURPA to approve a firm capacity and energy term lasting no longer than the life of the avoided unit (in this case, 20 years) and Panda's attempt to extend the term by typing in a termination date which included 10 additional years was ineffective to avoid that provision of PURPA.

Far from having been preempted, as Panda claims, FPSC, in issuing these two regulations and then resolving the disputes about them described above, did just what this Court described in *FERC v. Mississippi* as appropriate state implementation of FERC's PURPA rules. While 16 U.S.C. § 824a-3(g) does set out the form of *judicial* review available for state PURPA enforcement, it nowhere preempts the resolution of conflicts regarding implementation of the states' PURPA rules represented by FPSC's order as affirmed by the Florida Supreme Court. Since FERC was not reticent about preempting those areas it intended to preempt, the lack of any preemption as to state administrative implementation of state PURPA rules is dispositive.[4] To re-paraphrase Panda's inaccurate summary of the law into one that is accurate, "Congress did not declare, and rationally could not have directed", that state regulatory bodies be given the responsibility to implement PURPA while preempting their ability to resolve disputes about the very rules they adopted to implement PURPA. In short, FPSC was not preempted from issuing an order declaring that, contrary to

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4. As demonstrated by Panda's current filings before the FPSC, FPSC did not, contrary to Panda, allow the utility to "escape the very contracts PURPA fostered". n.2, *supra*. What FPSC did was to require adherence to the *PURPA implementation rules* incorporated as terms of the contract.

Panda, building a 115 MW plant was inconsistent with the state imposed 74.9 MW limit in the rule and delivering 30 years of firm capacity and energy was inconsistent with the state imposed 20 year limit in the rule.

II.

THE FLORIDA SUPREME COURT'S INTERPRETATION UPHOLDING FPSC'S ABILITY TO RESOLVE DISPUTES CONCERNING ITS PURPA IMPLEMENTATION RULES IS CONSISTENT WITH EVERY FEDERAL AND STATE COURT INTERPRETATION OF PURPA, INCLUDING THOSE CITED BY PANDA.

In attempting to find support for its position, Panda cites a number of cases in which state regulatory bodies have been preempted for attempting to act in the preempted area of rate regulation. However, none of these cases involves the resolution by a state regulatory body of conflicts arising out of the *state rules implementing PURPA*. Therefore, these cases are irrelevant to this case.

For example, *Independent Energy Producers Association, Inc. v. California Public Utilities Commission*, 36 F.3d 848 (9th Cir. 1994), involved the CPUC's attempt to formulate a system under which QFs were identified as complying or non-complying with federal regulations and *compensated at different rates* based on that status. This did not implement PURPA, which accorded FERC the exclusive responsibility to certify QF status and gave no *rate regulation* capacity to states based on their assessment of any particular cogenerator's QF status as complying or non-complying. Accordingly, the state activity was found by the Ninth Circuit to be preempted.

Similarly, *Smith Cogeneration Management, Inc. v. Corporation Commission*, 863 P.2d 1227 (Okla. 1993), involved, not PURPA implementation, but instead, a notice provision of continuous rate regulatory supervision by the Oklahoma Commission, something quite obviously implicating the preempted area of rate regulation. Accordingly, the Oklahoma Supreme Court reversed the order.

Indeed, the case most heavily relied upon by Panda, *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners of State of New Jersey*, 44 F.3d 1178 (3rd Cir.), *cert. denied*, __ U.S. __, 116 S. Ct. 68 (1995), illustrates again the total irrelevance of Panda's case citations. Could the New Jersey BRC's attempt to tailor rates paid the QF to changing conditions over time possibly be considered implementation of state PURPA rules? Surely not. It would be difficult to find a clearer case of activity implicating the preempted area of rate regulation and, not surprisingly, the Third Circuit found the activity to be preempted. However, *Freehold* is not only irrelevant to Panda's attack on the Florida Supreme Court's opinion, but a powerful case in support of that opinion. In arriving at the conclusion that the New Jersey BRC's activities were preempted, the Third Circuit provided a careful analysis to assure itself that there was no issue concerning the state's PURPA implementation rules, such as those at issue in this case, involved in *Freehold*:

> There is no dispute here that section 210(f) [of PURPA] gives state regulatory authorities power to implement the requirements of section 210(a) and the relevant regulations. In fact, both section 210(e)(3) and the applicable regulation, 18 C.F.R. s. 292.602(c)(2), expressly limit the exemptions from state law that QFs enjoy under §§ 210(e): *QFs simply are not exempt from state laws and*

> *regulations enacted pursuant to s. 210(f) and, with it, s. 210(a).* [e.s.]

44 F.3d at 1191-2. Since both PURPA implementation rules at issue in this case were adopted by Florida pursuant to § 210(f), the *Freehold* analysis verifies that Panda simply is not exempt from them and FPSC's order to that effect, affirmed by the Florida Supreme Court in the decision Panda challenges, *is not preempted.*

Like *Freehold*, *Erie Energy Associates*, 1992 N.Y. PUC LEXIS 52, may at first appear to support Panda's theory that all post-approval state regulatory activity is automatically preempted and that all "contract disputes" must be handled by the courts:

> Jurisdiction under the Public Utility Regulatory Policies Act of 1978 (PURPA) and PSC § 66-c is generally limited to supervision of the contract formation process. Once a binding contract is finalized, however, that jurisdiction is usually at an end. *n.1.* [e.s.]

However, the footnote is fatal to the attempted application of Panda's theory to this case and, as in *Freehold*, the analysis powerfully supports FPSC's position:

> n.1. *Continuing jurisdiction* [by the NYPSC] *is exercised* only *over* a few *contract clauses*, generally where *required by* statute or *regulation.* [e.s.][5]

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5. Such *state imposed* contract clauses would have been relatively few in the negotiated contract at issue in *Erie*, but are more numerous in the standard offer contract at issue here, a contract accurately described as "state-controlled".

"Contract clauses required by regulation" describes perfectly the two FPSC rules incorporated into Panda's standard offer contract at issue in this case. *Erie* is therefore perfectly in accord with FPSC's "continuing jurisdiction" to implement those rules, and not at all in accord with Panda's claim that the Commission was preempted or that all disputes regarding contract clauses required by rules implementing PURPA must be left to the courts.

By the time this matter was presented to FPSC in 1995, both rules at issue had been in effect over an extended period. The issue presented was FPSC's administrative construction of two of its PURPA implementation rules. For Panda to claim that this particular dispute must have been adjudicated by a court rather than by the Commission or that the Commission was preempted from doing so is contrary to the relevant analyses in *Freehold* and *Erie* noted previously. That claim is also directly contradicted by this Court's explicit holding concerning resolution of disputes by state regulators in *FERC v. Mississippi*.

Finally, *American Paper Institute v. American Elec. Power*, 461 U.S. 402 (1983), *Kamine/Besicorp Allegheny L.P. v. Rochester Gas & Electric Corp.*, 908 F. Supp. 1180 (W.D. NY 1995) and *Rosebud Enterprises v. Idaho Public Utilities Commission*, 917 P.2d 766 (Idaho 1996), do not support Panda's claim of conflict either. The contract which Panda signed and the Commission approved in 1992, was, by its terms, conditioned on compliance with the two rules incorporated therein. By operation of one of those rules, 20 years was established as the plant life fully avoided by Panda's delivery of firm capacity and energy. Thus, the order affirmed by the Florida Supreme Court does not conflict with *American Paper*. Instead, Panda's claim to a 30 year duration of firm capacity and energy delivery, exceeding by 10 years the life of the avoided unit, not only conflicts with *American Paper*, but with PURPA

itself, as noted by the Florida Supreme Court. (Pet. App. at 11a.) (*See also Rosebud, supra*, at 780: "If parties are required by state law or policy to sign contracts that reflect rates for QF sales at wholesale that are in excess of avoided cost, those contracts will be considered void ab initio.")

Panda can take no comfort either in the *Kamine/Besicorp* and *West Penn* opinions. Those cases do not encompass this case, where Panda signed a contract signifying its intent to comply with FPSC's rules incorporated therein and then viewed the state approval thus secured as the starting point to repudiate these rules and to litigate toward a larger plant and longer contract duration than those PURPA implementation rules allow. Any doubt that Panda's strategy is thus accurately described must give way based on comparing Panda's *current* representations to FPSC with its petition to this Court. In its pending *Motion For Extension of Contract Performance Dates* before FPSC, Panda states,

> Panda is willing to abide by the final order and build the power plant in accordance with the Commission's ruling.

n.2, *supra*. Panda makes this representation to FPSC even as it petitions here — without any support — to *litigate away* the final order affirming the Commission's ruling. Moreover, it was in the same *West Penn* litigation inappropriately referenced by Panda that FERC held, "*it is up to the States*, not [FERC], *to determine the specific parameters of individual QF power purchase agreements* . . ." [e.s.] *West Penn Power Co.*, 71 FERC ¶61,153 (1995). *That* is the principle with which Panda has been at odds in various fora since 1992. It is a principle unrelated to preemption in whatever formulation Panda has theorized about it.

III.

PANDA HAS IDENTIFIED NO CONFLICTING PRECEDENTS NOR, *A FORTIORI*, A NEED TO RESOLVE THEM.

Panda's concluding rhetorical peroration about the threats to PURPA brought on by changes in the electric power industry, whether right or wrong, is unrelated to the facts and law of this case. The order challenged by Panda *implements PURPA*, apparently to Panda's chagrin. Panda wants to build a larger plant than Florida's PURPA rules permitted to standard offer contract participants and to exceed the avoided cost ceiling mandated by Congress by delivering 30 years of firm capacity and energy to avoid construction of a 20 year plant.

Moreover, neither FPSC nor the Florida Supreme Court has "invalidated" Panda's contract, as Panda has misrepresented in its Petition. Had that been the effect of FPSC's ruling, Panda would not currently be filing motions before FPSC asking for an extension of *contract performance dates* and stating,

> Panda is willing to abide by the final order and build the power plant in accordance with the Commission's ruling.

n.2, *supra*.

Panda's attempt to rely on *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), is the final irony, since that case represents the model for rejecting the kind of overly-broad claims of federal preemption that Panda asserts here. In *Louisiana*, this Court noted that express jurisdictional limitations on FCC power contained in § 152(b) of the Communications Act of 1934

> fences off from FCC reach or regulation intrastate matters . . .

Similarly, as this Court held in *FERC v. Mississippi*, the fact that certain specified areas of state utility regulation have been preempted in PURPA cannot be broadened to create preemption as to unrelated matters, such as a state agency's ability to implement its own PURPA rules enacted pursuant to § 210(f) by resolving disputes on a case-by-case basis. *Louisiana* is in accord, not in conflict, with that principle, as are *Freehold* and *Erie*. The fact that the other cases discussed do not concern disputes about state PURPA implementation rules at all does not mean that they can be portrayed as conflicting. Again, ironically, the only threat here to implementing Congress' will is in Panda's arguments, since Congress could not have intended that the states be made responsible for implementing PURPA and at the same time be preempted from resolving conflicts over the very state rules by which PURPA is implemented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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